FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
NAGPUR BENCH, NAGPUR

Second Appeal No. 625/2004

Appeal	District :
Application No.	of 200
Writ petition	

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's orders

CORAM : Smt. V. A. Naik, J.
DATED : February 6, 2007.

Heard Shri Lohiya for the appellant, and Shri C.A. Joshi for the respondents.

The appellant is the original defendant who has lost the litigation in both the Courts. A suit was filed by the respondents for a decree of partition and separate possession of their shares in the suit property.

The property was originally owned by the father of the appellant and the respondents, and after the death of father, the mother and the three sons of the deceased were entitled to 1/4th share each in the suit property. After the death of mother in the year 2001, the suit was filed by two sons against the defendant/present appellant, seeking partition and separate possession.

The appellant filed his written statement and pleaded that the plaintiffs were not entitled to 1/4th share of mother as the mother had executed a

Will in favour of the appellant on 16/3/1999.

The trial as well as the appellate Court considered the evidence on record to hold that the defendant had failed to prove that the document dated 16/3/1999 was a genuine document. The Courts held that the propounder of the Will failed to dispel the suspicious circumstances.

Shri Lohiya, the learned counsel for the appellant, submitted that the trial and the appellate Court had not appreciated the evidence on record in the right perspective and were not justified in holding that the appellant had failed to prove the validity of the Will dated 16/3/1999. It was submitted on behalf of the appellant that since one of the attesting witnesses to the Will was examined and since the attesting witness had deposed in his evidence that the testator was present in the office of the Sub Registrar for the execution of the Will and had duly executed the Will in his presence, the Will ought to have been held to be duly proved. The counsel for the appellant relied upon the decisions reported in **2004(4) All MR 569, AIR 1966 Rajasthan 40, 1996(1) Mh.L.J. 815, AIR 1995 SC 1684** to substantiate the aforesaid submissions.

Shri C.A. Joshi, the learned counsel for the respondents, on the other hand, submitted that no substantial question of law arises for consideration in this second appeal as both the Courts have

scanned the evidence tendered by the parties on record to hold that the defendant had failed to prove the validity of the Will dated 16/3/1999.

I have perused the judgments passed by the trial and the appellate Courts and have also considered the submissions made on behalf of the parties. A perusal of the judgments rendered by both the Courts would show that the Courts have considered the oral and the documentary evidence on record to hold that the Will produced by the appellant was not genuine and trustworthy. While recording the aforesaid finding, the Courts considered the fact that the testator was an old lady of 75 years and was illiterate. The Courts further considered the fact that the propounder has admitted in his evidence that the testator was conversant with Hindi language. The Courts further considered the admission of the appellant to the effect that the testator had never executed any document in Marathi language. The Courts found that the Will was executed in Marathi language and there was nothing on record to show that the contents of the document were explained to the testator before she signed the same.

The Courts then considered the admission of the appellant in his cross-examination to the effect that he was not aware of the Will till he found

it in the box on the thirteenth day ceremony after the death of the deceased. These aforesaid admissions were contradicted by the evidence of the attesting witness who deposed to the effect that he was called in the Sub Registrar's office by the appellant as an attesting witness to the document dated 16/3/1999. The Courts further considered the other material contradictions in the evidence of appellant and the attesting witness to hold that the appellant had failed to prove the Will dated 16/3/1999. The Courts further considered the admission of the appellant in his cross-examination that deceased Kamalabai had intention to dispose of her property in favour of her sons at the relevant time when the alleged Will was executed. The trial and the appellate Court considered several other circumstances for holding that the Will dated 16/3/1999 was not trustworthy and not a genuine document.

Since both the Courts have appreciated the entire evidence tendered by the parties on record to hold that the appellant/defendant had failed to prove validity of the Will dated 16/3/1999, it would not be proper for this Court to re-appreciate the entire evidence. Even otherwise, the approach of the trial and the appellate Courts in considering the evidence on record, is not only a probable approach, but is an extremely reasonable one.

The decisions relied upon by the appellant are hardly of assistance to the appellant. It is submitted on behalf of the appellant that the Court ought to have held that the Will was duly proved and was a genuine document solely on the testimony of the attesting witness. The judgment reported in 2004(4) All MR 569 would not help the appellant as in that case, the Court observed that the circumstances of the case appear to be natural and in the ordinary course of events, but such is not the case here. Similarly, the decision reported in AIR 1996 Rajasthan 40 is clearly distinguishable on facts. Also the judgment reported in 1996 (1) Mh.L.J. 815 would also not come to the rescue of the appellant as in that case, the validity of the Will was challenged on the ground that the other attesting witness to the Will had not been examined though one of them was examined. This Court, therefore, in the aforesaid reported case, held that there was nothing to show that the attesting witness examined by the propounder was an interested witness and consequently, the challenge to the validity of the Will was negatived. The aforesaid decisions would, by no stretch of imagination, apply to the facts or grounds of challenge raised in this second appeal. Lastly, in the decision reported in AIR 1995 Supreme Court 1684, the Supreme Court held that the exclusion of daughters would not by itself be a

circumstance to infer that the Will executed by the testator was not a genuine one. The facts of the reported case and the present one are entirely different and, therefore, the aforesaid decision of the Supreme Court cannot be applied to the facts of the present case.

Shri Lohiya, the learned counsel for the appellant, lastly submitted that the suit filed by the plaintiffs for partition of the properties was not maintainable as the plaintiffs had not included all the properties belonging to the joint family, in the suit. The counsel for the appellant submitted that the appellant may be granted an opportunity to amend his written statement to incorporate the aforesaid plea as the respondents have admitted in their evidence about the existence of one more property which is not included in the suit.

The oral prayer made on behalf of the appellant is highly unreasonable. The appellant neither pleaded the aforesaid fact in his written statement, nor had the appellant filed an application for amendment of the written statement at any earlier point of time. The appellant cannot take advantage of a stray admission in the cross-examination of the respondent, which have no bearing on the issue involved in the civil suit and of which no plea was raised by the defendant, to non-suit the plaintiff at this stage or to seek a fresh trial

of the matter on the mere asking. The oral request on behalf of the appellant being extremely unreasonable, is rejected for the reasons recorded herein above.

Since no substantial question of law arises for consideration in this second appeal, second appeal is dismissed with no order as to costs.

JUDGE

RMP